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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

AMOS COTNEY,
Petitioner,
vs.
THE STATE OF ALABAMA.

No. 525

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA, AND BRIEF IN SUPPORT THEREOF.

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INDEX.

	Page
Petition for writ of certiorari	1-17
Statement of matter involved	1
Statement of jurisdiction	9
The questions presented	14
Prayer for the writ	17
Brief of Petitioner	19-55
The opinion of the Court below	19
Jurisdiction	20
Statement of the case	23
Errors assigned	28
Argument	29
Point I. The Alabama Court of Appeals has final appellate jurisdiction of all felonies where the punishment has been fixed at 20 years or under.	29
Point II. The Supreme Court of Alabama has power to issue writs of injunction, habeas corpus, quo warranto, and such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions	30
Point III. The jurisdiction of the Supreme Court of Alabama to review the judgments and decisions of the Court of Appeals of Alabama is by way of common law certiorari, and is limited to a review of the opinion of the Court of Appeals, and is not extended to the record brought up to the Court of Appeals from the trial court	30

Point IV. The common law writ of certiorari reaches only to the jurisdiction of the subordinate tribunal and the regularity of its proceedings and can only correct errors of law apparent upon the face of the record..... 32

Point V. At common law the judgment in certiorari was either to quash the proceedings reviewed, or to sustain them..... 32

Point VI. The Court of Appeals of Alabama has full appellate power and jurisdiction to correct, modify, vacate, or reconsider its judgments so long as the cause in which the judgment was rendered remains in fieri in the Court of Appeals 34

Point VII. The action of the Court of Appeals of Alabama in permitting the application for rehearing of December 19, 1945, to be filed, setting the same down for oral argument and hearing oral argument upon its merits, amounted to an exercise of the judicial discretion of the court to entertain and determine whether such application for rehearing should be granted..... 38

Point VIII. The refusal of a court to adjudicate a matter within its jurisdiction is a denial of due process of law 39

Point IX. The Supreme Court of Alabama was without constitutional power to oust the Court of Appeals of Alabama from exercising its final appellate jurisdiction by giving such consideration to petitioner's application for rehearing filed December 19, 1945, as in the sound judicial discretion of the Court of Appeals such application for rehearing was entitled to receive..... 44

Conclusion 49

Cases Cited.

Andrews v. City of Birmingham, 22 So. (2d) 41 (2nd Case), 246 Ala. 668..... 31

Barnes v. State, 14 So. (2d) 246, 244 Ala. 597..... 31

City of Birmingham v. Andrews, 132 So. 877, 34 C. J. 212-214, and multitudinous authorities cited in Note 13, 34 C. J. 214.....34, 35

Cotney v. State, 26 So. (2d) 598, 603, 605 .....4, 6, 9, 25, 40, 42, 44, 45, 46, 47, 49, 50, 53

Cushman v. Com'rs Court, Blount County, 49 So. 311, 166 Ala. 227 32

Ex Parte Pollard, 69 So. 425, 193 Ala. 32..... 31

Ex Parte Stanley, 88 So. 449, 205 Ala. 431..... 31

Ex Parte State, Ex. Rel. Davis, 94 So. 274, 208 Ala. 439 31

Ex Parte State, 61 So. 53, 181 Ala. 4..... 31

Fore v. Fore, 44 Ala. 478..... 32

Gandy v. State, 198 So. 267, 240 Ala. 202..... 32

Hanson v. State, 168 So. 700, 232 Ala. 585..... 31

In re Central R. Co. of New Jersey, 136 Fed. (2d) 633, 54, 64 S. Ct. 437, 320 U. S. 805, 88 L. Ed. 486..... 39

Ingram v. State, 3 So. (2d) 434, 241 Ala. 455..... 31

Kirkwood v. State, 63 So. 990, 184 Ala. 9..... 31

Lamar v. Com'rs Court, Marshall County, 21 Ala. 772. 32

Lancaster v. State, 106 So. 617, 214 Ala. 2..... 30

Max J. Winkler Brok. Co. v. Courson, 49 So. 341, 160 Ala. 374 32

N. Felis v. Royal Harness & Saddlery Co., 54 So. 504, 170 Ala. 160 32

Newman v. State, 9 So. (2d) 446, 243 Ala. 256..... 31

New York v. Wilson, 63 S. Ct. 840, 317 U. S. 688, 87 L. Ed. 1083 39

O'Reilly v. State, 179 So. 263 (First Case), 235 Ala. 328 31
Price v. Court of Com'rs Marshall County, 65 So. 163, 186 Ala. 611 31
Rainey v. State, 17 So. (2d) 687, 245 Ala. 458..... 31
Tillison v. State, 27 So. (2d) 43..... 30
Towns v. Malone, 116 So. 131, 217 Ala. 273..... 32
Van Dyk v. Van Dyk, 33 N. Y. S. (2d) 766..... 39
Vincent v. State, 22 So. (2d) 344..... 31
Wilson v. State, 51 N. E. (2d) 848..... 39

Textbooks Cited.

Ala. Digest, Vol. 7, Crim. Law, Key No. 1179..... 31
14 C. J., Cer. Para. 108, p. 245..... 44
14 C. J. S. 123.....32, 34
34 C. J. 210-214..... 35
34 C. J. 213, Para. 437..... 44

Statutes Cited.

Act of Congress, Feb. 13, 1925, Sec. 247-b, 28 U. S. C. A., Sec. 344, p. 205.....10, 20
Alabama Supreme Court Rule 38, Volume 7..... 38
Code of Alabama, 1940, Title 13, Secs. 85 and 86 .....9, 10, 23, 29
Constitution of Alabama, 1901, Sec. 140.....9, 10, 23, 29, 30
Constitution of the United States, Fourteenth Amendment 9

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

AMOS COTNEY,

Petitioner,

vs.

No. .....

THE STATE OF ALABAMA.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of Alabama.

The petitioner, Amos Cotney, respectfully shows to this Honorable Court:

A.

STATEMENT OF MATTER INVOLVED.

1. Your petitioner is a citizen of the United States and of the State of Alabama. He was indicted by the grand jury of Clay County, Alabama, in the Circuit Court of Clay County, Alabama, filed on the 16th day of November, 1943 (Rec. p. 2). The indictment contained two counts, each charging murder in the first degree, a capital felony, which might, in the discretion of the jury, have been punished by death in the electric chair.

There was no denial that your petitioner fired the fatal shot which resulted in the death of Buster Adams (the victim named in the indictment). There was conflicting testimony in the evidence as to whether your petitioner was shooting at another person, and without intention, shot the deceased, and there was also conflicting testimony in the evidence as to whether your petitioner was acting in self-defense in shooting at the other person. There was substantial evidence that this other person was shooting at your petitioner immediately before and at the time the fatal shot which killed Adams was fired. Your petitioner is convinced that the great weight of the evidence supported his plea of self-defense as to this other person. Your petitioner is sincerely convinced that the scales were turned against him in his defense by certain testimony of decedent's widow as to the conduct of your petitioner and decedent at the time of the shooting, and as to a certain alleged dying declaration attributed to the decedent by the widow in which she testified that:

> "Buster looked up at him and said, 'Don't shoot me again, Amos; you have already killed me'; Cotney, he said, it sounded like he said, 'I killed one son-of-a-bitch, and I have two more to go'" (Rec. p. 12).

This testimony, coupled with the other testimony of the widow, tended to prove that your petitioner maliciously and intentionally shot and killed Adams, and was in direct contradiction of the great weight of the testimony to show that Cotney was being attacked by another person, who was firing at him with a pistol or a shot-gun, and whose attack was being resisted when decedent Adams inadvertently received his fatal wound.

Mrs. Adams, widow of decedent, also testified that she talked more than one time with her deceased husband,

while he was at the hospital, and in those conversations he asked her if there was powder burns and said that he, Cotney (petitioner), stuck a gun up against his stomach and shot him and he must be badly powder burned. These declarations could not be part of the res gestae.

The first statement, hereinbefore mentioned, was admitted by the trial court, probably, on the theory that it constituted a part of the res gestae, and also as a dying declaration. The statement made to the witness at the hospital was made about three or four days after decedent went to the hospital—according to her testimony (Rec. p. 48).

During the trial, your petitioner sought to prove by Dr. L. G. Cole (Rec. pp. 49-53) that he had a conversation with the witness that the deceased Adams made a contradictory statement to him while in the hospital. After Doctor Cole testified that he was a practicing physician, residing in Ashland, Alabama, and was in attendance upon the decedent Adams treating the wound from which he died, and in the hospital, and on the way to the hospital, he talked with decedent Adams, and your petitioner, through his counsel, started to prove what Adams said to him. This testimony was excluded by the trial court.

Your petitioner also started to prove contradictory statements made by the decedent Adams to Dr. C. W. C. Moore (Rec. pp. 53, 54a). The particular statement attributed to the decedent by the two doctors, which your petitioner started to prove, was set out in the offer to show by your petitioner's attorney, in the following language:

> "The deceased asked Dr. Cole if they put Amos Cotney in jail, and he told him he didn't know; and the deceased said, 'Well, I hope they don't; he is one of the best friends I have ever had and I am sure this was an accident' " (Rec. p. 51).

Your petitioner is sincerely convinced that if the jury had been permitted to consider the testimony of the two doctors, as offered in the aforementioned offer to prove, the weight which the jury would have given to the testimony of the widow would have been so greatly diminished that your petitioner would have prevailed in his plea of self-defense. Your petitioner insists that this testimony was admissible, if not as a dying declaration, then it was admissible as a contradictory statement made by the decedent impeaching the dying declaration attributed to him by the widow in her testimony, and directly discrediting all of the testimony of the widow as to the res adjustae.

Upon appeal to the Court of Appeals of the State of Alabama, the opinion rendered by the Court of Appeals sustained the trial court in its action rejecting this testimony of the two doctors upon the theory that proper predicate had not been laid to justify its admission as a dying declaration, but did not discuss or consider the admissibility of this testimony as testimony in impeachment of the dying declaration of decedent, to which decedent's widow had testified (Rec. pp. 183, 190). **26 So. 2d 598.**

Upon review of the Opinion of the Court of Appeals of Alabama, the Supreme Court of Alabama, upon application for writ of certiorari, granted the writ and reviewed the judgment of the Court of Appeals affirming the judgment of the trial court holding that the testimony offered by your petitioner was admissible under a well-established rule that a dying declaration may be impeached by evidence of another statement by the deceased at another time, though he was not then impressed that his death was inadvertable, **Cotney v. State, 603, 605** (Rec. pp. 207, 209), and on second application for a rehearing on the petition for certiorari the Supreme Court of Alabama withdrew its judgment of reversal and ordered that "the judgment of the Court of Appeals is affirmed" (Rec. p. 213).

Thereupon and thereafter, your petitioner filed in the Court of Appeals of Alabama, on December 19th, 1945, an application for rehearing, after the Supreme Court of Alabama had refused and denied your petitioner's application for a writ of certiorari, the chief burden of your petitioner's further application for rehearing being his defense that the Court of Appeals had not considered the evidence offered in testimony from the two doctors to the effect that "the deceased asked Dr. Cole if they had put Amos Cotney in jail," and he told him, "he didn't know." Then the deceased said: "I hope they don't, he is one of the best friends I have ever had" (Rec. pp. 215, 216), in the light of its admissibility to impeach the several alleged dying declarations to which the widow testified.

This application for rehearing was subjected to a motion to strike by the State of Alabama (Rec. p. 223) upon the general grounds that the Court of Appeals was without jurisdiction to consider petitioner's application for rehearing. The Court of Appeals of Alabama, acting through two of its judges (one judge having recused himself), heard oral arguments on the state's motion to strike, and the two judges announced orally that, in their opinion, that the Court of Appeals had jurisdiction of the application for rehearing and called the cause for argument on the merits, and after argument on the motion to strike and argument on the merits, took the matter under advisement on both the motion to strike and the merits (Rec. p. 235).

Thereafter, the State of Alabama, through its Attorney General, filed in the Supreme Court of Alabama, a petition for a writ of prohibition (Rec. pp. 218 et seq.) to restrain and prohibit the Court of Appeals from exercising jurisdiction in the matter of appeal of Amos Cotney versus the State of Alabama, by way of entertaining and considering your petitioner's application to the Court of Appeals of Alabama for a rehearing, which application was filed on December 19th, 1945 (Rec. pp. 215-218).

The Supreme Court of Alabama granted the writ of prohibition, restraining and prohibiting the Court of Appeals of Alabama from giving further consideration to your petitioner's application for rehearing last filed in the Court of Appeals of Alabama. Two of the Justices of the Supreme Court of Alabama dissented (Rec. pp. 243, 248). **26 So. 2d 608.**

The petitioner here says that he has been denied the due process of law pursuant to the guarantees of the due process clause of the 14th Amendment to the Federal Constitution, in that he has been denied the right to have the judgment and decision of the Court of Appeals of Alabama, that being the court of final appellate jurisdiction in his cause, as to a matter the decision of which would determine his right to liberty.

2. The chronology of the proceedings is as follows:

(a) Appeal was duly perfected to the Court of Appeals of the State of Alabama, the certificate of appeal appearing on page 182 of the record.

(b) The judgment of the Circuit Court of Clay County was affirmed by the Court of Appeals of Alabama in a judgment and opinion rendered February 13, 1945 (Rec. pp. 183-190). 26 So. 2d 598.

(c) Application for rehearing was duly and timely filed in the Court of Appeals on February 28th, 1945, and was overruled on March 13th, 1945 (Rec. p. 190).

(d) Petition for writ of certiorari to the Court of Appeals of Alabama was duly and timely filed in the Supreme Court of Alabama on March 27th, 1945, and submitted on briefs (Rec. pp. 191-193), and on April 12th, 1945, was by the Supreme Court of Alabama denied (Rec. p. 194).

(e) Your petitioner filed his application to the Supreme Court of Alabama, duly and timely, on April 26th, 1945, for

a rehearing on his petition for certiorari to the Court of Appeals of Alabama (Rec. pp. 195, 196), and on June 12th, 1945, the Supreme Court of Alabama made an order, per curiam, finding a probability of merit and ordering preliminary writ to issue and setting the cause down for submission on briefs or oral arguments on Wednesday, June 20th, 1945, at ten o'clock A. M. (Rec. p. 197), and the cause was argued and submitted in the Supreme Court of Alabama on the application for rehearing on June 20th, 1945, and thereafter on July 26th, 1945, the Supreme Court of Alabama made an order that the judgment of the Court of Appeals be reversed and annulled and the cause remanded to the Court of Appeals for further proceedings (Rec. p. 200).

(f) Thereafter, on August 4th, 1945, the State of Alabama made application for a rehearing in the Supreme Court of Alabama (Rec. p. 201), which rehearing was by the Supreme Court granted on October 25th, 1945, and order made "that the judgment of the Court of Appeals be and the same is hereby affirmed" (Rec. p. 203).

(g) Thereafter, on, to-wit, November 9th, 1945, your petitioner filed his application to the Supreme Court of Alabama for a rehearing upon the judgment of the Supreme Court of Alabama rendered October 25th, 1945 (Rec. pp. 204, 205), which said application of your petitioner was on December 6th, 1945, overruled (Rec. p. 206).

(h) Thereafter, on December 19th, 1945, your petitioner filed in the Court of Appeals of Alabama his application for rehearing on remand of the cause from the Supreme Court of Alabama (Rec. pp. 215, 216).

(i) Thereafter, the State of Alabama filed its motion to strike said application for rehearing filed on December 19th, 1945 (Rec. pp. 223, 224), and on, to-wit, March 1st, 1496, the State of Alabama, upon the relation of the Attor-

ney General, filed in the Supreme Court of Alabama a petition for writ of prohibition to issue to the Court of Appeals of Alabama, and the judges thereof, restraining and prohibiting said court and the judges thereof from further entertaining and considering, or further exercising jurisdiction in the matter of the appeal of Amos Cotney versus The State of Alabama upon the said Amos Cotney's application for rehearing on remand of said cause from the Supreme Court (Rec. pp. 217, 222), to which petition for writ of prohibition was attached exhibits mentioned therein (Rec. pp. 223, 226), and rule nisi was issued thereon pursuant to the order of the Supreme Court made and entered on March 2nd, 1946 (Rec. pp. 227-231). The Court of Appeals of Alabama and two of its judges (one judge having recused himself) filed its answer to said petition for a writ of prohibition on March 18th, 1946, setting up that the appeal of Amos Cotney versus the State of Alabama was a pending cause in the Court of Appeals of Alabama, and that the Court of Appeals, pursuant to Section 140 of the Constitution of Alabama of 1901, and Title 13, Section 86, Code of Alabama of 1940, had full, complete and final appellate jurisdiction of all felonies where the punishment has been fixed at twenty (20) years or under (such as that in this case), and setting out that the said application for rehearing upon the remand from the Supreme Court had been filed in the Court of Appeals, to motion to strike same had been filed; that the Court of Appeals, acting through its two said judges, had heard oral argument upon the motion to strike and upon the merits of the application, and at the time of filing its answer had the matter under advisement, both to the motion to strike and on the merits of the case (Rec. pp. 232, 238).

(j) Thereafter, the Supreme Court of Alabama, on, to-wit, April 25th, 1946, rendered its opinion and judg-

ment granting the writ of prohibition as prayed (Rec. pp. 243, 246), with a dissenting opinion of two of the Justices (Rec. pp. 246, 248). 26 So. 2d 608. An application to the Supreme Court of Alabama for a rehearing thereon being duly and timely filed on May 10th, 1946 (Rec. pp. 253, 257), said application for rehearing was denied on June 27, 1946 (Rec. p. 259).

(k) Thereafter, on June 29th, 1946, the Court of Appeals of Alabama made and entered an order striking petitioner's application for rehearing filed on December 19th, 1945 (Rec. p. 262) in obedience to the writ of prohibition.

B.

STATEMENT OF JURISDICTION.

1. The Supreme Court of the United States has jurisdiction to grant the relief herein prayed because this is a case wherein there is drawn into question the validity of trial procedure in appellate state courts under the Constitution of the United States, and particularly the due process clause of the Fourteenth Amendment thereto, in that your petitioner has been denied due process of law by reason of being denied the right to have the final determination and judgment of the Court of Appeals of the State of Alabama upon a question involving his liberty for a period of twenty (20) years, that being the court vested with final appellate jurisdiction of all felonies wherein the punishment is fixed at a period of twenty (20) years or less, pursuant to the provisions of Section 140 of the Constitution of Alabama of 1901, and Title 13, Section 86 of the Code of 1940, the Court of Appeals of Alabama having been ousted from further consideration of your petitioner's application for rehearing on remand from the Supreme Court of Alabama, after having entered upon a considera-

tion of the cause, and having heard oral arguments thereupon, both upon the merits of said application for rehearing and upon the appellee's motion to strike the same, this being in violation of your petitioner's right not to be deprived of his life, liberty or property except upon the considered judgment of the Court of Appeals of the State of Alabama, and his right pursuant to due process of law guaranteed in the Fourteenth Amendment to the Federal Constitution to have the decision and judgment of the Court of Appeals of the State of Alabama.

2. The Act of Congress of February 13th, 1935, Sec. 247-b, 28 U. S. C. A., Sec. 344, p. 205, authorizes review by the Supreme Court of the United States by writ of certiorari

> "where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution,"

in that this petitioner claims the right to have the judgment of the Court of Appeals of Alabama upon his application for rehearing filed on December 19th, 1945, and upon the motion of appellee (State of Alabama), to strike the same; and your petitioner claims that this right is vested in him under and by virtue of the provisions of Section 140 of the Constitution of Alabama of 1901, and Title 13, Section 86 of the Code of Alabama of 1940, and that the denial to him of the independent, deliberate and considered judgment and decision of the Court of Appeals of Alabama, upon the matters presented by his application for a rehearing filed December 19th, 1945, and the denial to him of the right to have said Court of Appeals of Alabama exercise its discretion in entertaining the same, amounted to a denial of that due process of law guaranteed to him by the due process clause of the Fourteenth Amendment to the Constitution of the United States, and denied

to him the right to have the Court of Appeals of Alabama exercise final appellate jurisdiction in his cause, his cause being a felony wherein the punishment was fixed at twenty (20) years imprisonment in the penitentiary or less, which denial violated his right guaranteed under the due process clause of the Fourteenth Amendment to the Federal Constitution.

3. The judgment which this petitioner prays the Supreme Court of the United States to review was rendered by the Court of Appeals of Alabama on June 29th, 1945, pursuant to a writ of prohibition issued to and directed to the Court of Appeals of Alabama, and served upon the Judges of said Court on the 25th day of April, 1946 (Rec. pp. 251, 252), and to review the judgment of the Court of Appeals of Alabama upon the appeal of Amos Cotney versus the State of Alabama, which said judgment was rendered by the Court of Appeals of Alabama on February 13th, 1945, the opinion of the Court of Appeals appearing in the record at pages 183-190, and in the published reports, 26 So. 2d 598. The chronology of proceedings continuing this matter in fieri appears hereinbefore in subdivision 2 of Division "A" of this petition and need not here be repeated.

4. The constitutional questions here raised are serious and not frivolous. They involve the right of a defendant charged with a capital felony to have the final judgment and decision of the Court of Appeals of the State of Alabama upon his appeal thereto in a matter wherein he was convicted of a felony and sentenced to a term of twenty (20) years in the penitentiary.

And it is the purpose of this petitioner to show that the Court of Appeals of Alabama has appellate jurisdiction of his cause; that his cause was in fieri in the Court of

Appeals of Alabama on the 19th day of December, 1945, at the time he filed his application for a rehearing; that it was the discretionary right of the Court of Appeals of Alabama to entertain said application for rehearing and to consider the same, and the cause then pending being in fieri, the Court of Appeals of Alabama had full power in the exercise of its sound discretion to make any order or judgment and to alter, modify or change any prior order or judgment so long as its judgment conformed to the law of the land, and to correct any error in any former judgment, and, that your petitioner had the constitutional and vested right to the benefit of the exercise of this sound discretion on the part of the Court of Appeals, and that to deny him the right to have the Court of Appeals of Alabama exercise its jurisdiction in the premises was a denial to him of the due process of law guaranteed to him by the Fourteenth Amendment to the Federal Constitution.

And it is the purpose of this petitioner to show that the Supreme Court of Alabama has no jurisdiction of your petitioner's appeal from the judgment rendered by the Clay County Circuit Court; that the Supreme Court of Alabama has no power or jurisdiction to enter any order of judgment in the matter of the appeal of Amos Cotney versus State of Alabama, from the Circuit Court of Clay County, Alabama; that its power to review the Court of Appeals of Alabama is limited to its power to exercise "a general superintendence and control of inferior jurisdictions" (Sec. 140, Code of Alabama, 1901), by the issuance of such remedial and original writs as may be necessary; that the Supreme Court of Alabama has exercised this power of general superintendence by a limited common law writ of certiorari, wherein the Supreme Court of Alabama has declared repeatedly and consistently that its

power to review the Court of Appeals of Alabama is limited and that its

> "review is limited to a consideration of that single point, as we only review the Court of Appeals upon questions decided, and do not make an original examination of the record of the proceedings in the Circuit Court to determine if such records show error apart from the principles stated by the Court of Appeals of Alabama," Tillison v. State, 27 So. 2d 43,

and it is our purpose further to show that the Supreme Court of Alabama has no power under the constitutional and statutory restrictions upon its jurisdiction to render any judgment in the matter of an appeal from a conviction of a felony where the punishment is fixed at 20 years or less, and that its attempted exercise of a power to **affirm** or **reverse** a judgment of the Court of Appeals in the matter of such an appeal to the Court of Appeals, if construed to mean more than that, the writ of certiorari is **denied**, or that the writ of certiorari is **granted**, is a usurpation of power; and to compel this petitioner to be denied the right to have the Court of Appeals of Alabama reconsider any matter of fact, or conclusion of fact, not theretofore determined by the Court of Appeals, for and on account of such a judgment of the Supreme Court of Alabama having affirmed the Court of Appeals' prior judgment, is to deny to this petitioner his right not to be deprived of his liberty except by due process of law, in that it subjects him to imprisonment in the penitentiary of Alabama for a period of twenty (20) years upon a judgment of conviction, affirmed by a judgment of the Supreme Court of Alabama, and denying to him the right to have the Court of Appeals of Alabama exercise its own free, untrammelled appellate jurisdiction, limited only by the law of the land.

These questions were presented to the Supreme Court of

Alabama and were seriously argued and presented in an effort to persuade the Supreme Court of Alabama that it had no power to limit the exercise of the jurisdiction in an appeal such as this, and has not been waived, having been raised at the first opportunity to raise this question and continuously insisted upon thereafter.

C.

THE QUESTIONS PRESENTED.

1. Does a cause remain in fieri in the Court of Appeals of Alabama during all of the time the exercise of its jurisdiction is suspended pending final decision by the Supreme Court of Alabama of questions presented by writ of certiorari directed to the Court of Appeals to review its decision?

2. If the cause continues to remain in fieri during the time application to the Supreme Court of Alabama for review of its decision by writ of certiorari is pending and until the Supreme Court of Alabama makes final disposition thereof, does the Court of Appeals of Alabama have full and complete power to exercise its own sound discretion by considering an application for further rehearing after the petition to the Supreme Court for writ of certiorari has been finally determined and before the Court of Appeals sends its mandate and remitter of said cause down to the trial court.

3. Does the Supreme Court of Alabama have the power to deprive or deny the Court of Appeals of Alabama the power to exercise a jurisdiction to decide for itself whether it will consider and determine an application for rehearing, based upon matters and things not concluded by its former decision after said former decision had been reviewed by the Supreme Court of Alabama on petition for

writ of certiorari and, if not possessed of such power, is the exercise of such power by the Supreme Court of Alabama and acquiescence therein by the Court of Appeals of Alabama, or denial of an appellant's right to have the Court of Appeals of Alabama exercise full and complete final appellate jurisdiction over his cause?

4. Does the judgment of the Supreme Court of Alabama upon a writ of certiorari, at common law, as limited by its prior decision, have the effect of concluding the Court of Appeals from consideration of matters and things material to the appeal but not considered in the opinion of the Court of Appeals reviewed by the Supreme Court of Alabama, or does the Court of Appeals, so long as the cause remains pending in that court, have the right to consider any matter material to the appeal theretofore overlooked by the Court of Appeals, and, if so, is the denial to this petitioner of the right of the Court of Appeals to exercise such appellate jurisdiction a denial of due process of law within the purview of the Fourteenth Amendment to the Federal Constitution?

5. Has the Court of Appeals, after having taken your petitioner's application for rehearing, filed on December 19th, 1945, and having heard oral arguments upon the merits thereon, and having heard oral argument upon the motion to strike, and having taken the matter under advisement, the right to acquiesce in an order of the Supreme Court prohibiting it (the Court of Appeals) from entertaining jurisdiction of said cause, and pursuant to such acquiescence and not acting within the exercise of its own sound discretion, strike said application for rehearing, and is such conduct a denial to this petitioner the right to have the Court of Appeals of Alabama exercise final appellate jurisdiction of his cause, and thereby denying him the right not to be deprived of his liberty except by due process of law guaranteed to him by the Fourteenth Amendment to the Federal Constitution?

6. Does this petitioner have the right to have the Court of Appeals of Alabama consider and determine whether or not the testimony offered from the witnesses, Dr. Cole and Dr. Moore, to the effect that "the deceased asked Dr. Cole if they put Amos Cotney in jail," and he told him, "He didn't know." Then the deceased said, "Well, I hope they don't, he is one of the best friends I ever had and I am sure this was an accident" (Rec. p. 215), considered and determined whether such testimony was admissible as an impeachment of the testimony as to the several prior declarations of the deceased, and if so, is a denial to this defendant of the right to have the considered judgment of the Court of Appeals of Alabama upon this point a denial of that due process guaranteed by the due process clause of the Fourteenth Amendment to the Federal Constitution?

And your petitioner says that he is not guilty as charged in the indictment in this cause filed; that he verily believes that but for the violation of his constitutional rights, privileges and immunities as hereinbefore set forth, the result of the trial in the court below would have been favorable to him and that the verdict rendered against petitioner is the product of a trial wherein his rights were prejudiced by the erroneous conduct of the trial as hereinbefore recited; and your petitioner verily believes that if the Court of Appeals shall exercise its own sound discretion in determining whether or not the testimony offered by this defendant in his own defense in impeachment of the prior declarations attributed to the deceased was admissible as such impeaching testimony, the Court of Appeals will determine that such testimony was admissible as an impeachment of the testimony theretofore offered in the trial, and following the law as announced by the Supreme Court of Alabama in its first opinion rendered on the petition for writ of certiorari, will reverse the judgment

rendered against your petitioner in the trial court, and upon a new trial, upon legally admissible testimony, your petitioner verily believes that he will be acquitted.

D.

PRAYER FOR THE WRIT.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of the Honorable Supreme Court of the United States and directed to the Court of Appeals of Alabama, commanding that court to certify and send to this court for a review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and styled Docket No. 819, 7th Division, Amos Cotney, appellant, versus the State of Alabama, appellee, and that the judgments of the Court of Appeals of Alabama, rendered on February 13th, 1945, and on June 29th, 1946, may be separately and severally reviewed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as may unto this Honorable Court seem meet and just, and your petitioner will ever pray.

AMOS COTNEY,

By.....
G. ERNEST JONES,
Counsel for Petitioner.

.....
RODERICK BEDDOW,
Of Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

AMOS COTNEY,
Petitioner,
vs.
THE STATE OF ALABAMA.
No. .....

BRIEF OF PETITIONER
In Support of Petition for Writ of Certiorari.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Court of Appeals of Alabama was rendered by the Court of Appeals of Alabama on February 13, 1945 (Rec. pp. 183-190), and appears in the published reports 26 So. (2d) 598; and final judgment finally disposing of the cause in the Court of Appeals, after certiorari to the Supreme Court of Alabama was rendered by the Court of Appeals on June 29, 1946, and is found in the record at page 262 and reads as follows:

> "June 29, 1946, it is ordered that the application for rehearing be and the same is stricken upon authority of ex parte State ex rel. Attorney General in re State of Alabama ex rel Attorney General v. Court of Appeals of Alabama, Supreme Court Ms.
>
> Per Curiam."

The opinion of the Supreme Court of Alabama to which reference is made in the last aforesaid judgment of the Court of Appeals is found in the record at pages 243, 246, and dissenting opinion is found in the record at pages 246 to 248. This opinion of the Supreme Court of Alabama prohibiting the Court of Appeals from further entertaining jurisdiction of petitioner's appeal is found in the published reports at 26 So. (2d) 608.

II.

JURISDICTION.

1. Statutory jurisdiction for this petition is founded upon the provision of the Acts of Congress of February 15, 1925, 28 U. S. C. A., Sec. 344, pages 205-206.

2. The date of the judgment of the Court of Appeals of Alabama is February 13, 1945; rehearing was denied by the Court of Appeals on March 13, 1945; petition for writ of certiorari to the Supreme Court of Alabama to review the opinion of the Court of Appeals was first denied by the Supreme Court of Alabama, and upon rehearing was granted and the judgment of the Court of Appeals was reversed on July 26, 1945, and upon further rehearing the Supreme Court of Alabama vacated the judgment granting the writ and reversing the judgment of the Court of Appeals and rendered a judgment granting the state's applications for rehearing and affirming the judgment of the Court of Appeals; and further rehearing for which this petitioner applied was denied on December 6, 1945, by the Supreme Court of Alabama. The opinions of the Supreme Court of Alabama in these proceedings being found in the record at pages 207-213, and appearing in the published reports at 26 So. (2d) 605. The opinions of the Supreme Court of Alabama were by a divided court and forceful dissenting opinions appear. Upon remand to the Court

of Appeals your petitioner filed an application for rehearing on December 19, 1945 (Rec. pp. 215-216) and the State of Alabama through its Attorney General filed a motion to strike said application for rehearing, full and complete copy of which appears in the record at pages 223-224; the Court of Appeals of Alabama did set the application for rehearing down for argument (Rec. pp. 219, 235) and did proceed to hear oral argument on the 28th day of February, 1946, upon the motion to strike said application for rehearing and upon its merits (Rec. pp. 220, 235) and did announce orally from the bench that the Court of Appeals did have to consider said application for rehearing (Rec. pp. 220, 235). After hearing such oral arguments the Court of Appeals did take the application for rehearing filed on December 19, 1945, under advisement; while the Court of Appeals had the last mentioned application for rehearing and the motion to strike the same under advisement and while this matter was within the breast of the Court of Appeals, the State of Alabama, acting by its Attorney General, filed in the Supreme Court of Alabama a petition for a writ of prohibition annexing as exhibits its motion to strike said application for rehearing pending in the Court of Appeals (Rec. pp. 218, 226); and the Supreme Court of Alabama did on, to wit, Saturday, March 2, 1946, issue its preliminary rule nisi upon the writ of prohibition (Rec. pp. 227-228), and thereafter, on to-wit, March 18, 1946, the Court of Appeals of Alabama and two of the judges thereof (the third judge, Harwood, having refused himself) did file their answer to the petition for writ of prohibition (Rec. pp. 232, 238), attaching to their answer as Exhibit A full and complete copy of the aforesaid application for rehearing filed December 19, 1945; issue was joined upon the writ of prohibition by the State of Alabama admitting the facts alleged in respondent's answer (Rec. p. 241), and thereafter on April 25, 1946, the Supreme Court of Alabama did render its opinion

and judgment wherein the majority of the court granted the writ of prohibition and a minority of the court dissented filing a written opinion. These opinions appear in the record at pages 243-248.

Application for rehearing on the petition for a writ of prohibition was filed by the Court of Appeals and the two judges thereof duly and timely, and was denied on June 27, 1946; the writ of prohibition having been recalled or stayed pending decision on the application for rehearing (Rec. p. 258).

Notice that said application had been overruled was duly served upon the Court of Appeals of Alabama on June 27, 1946 (Rec. p. 260). The Court of Appeals of Alabama bowing to the Supreme Court of Alabama did on, to-wit, the 29th day of June, 1946, enter the order striking the application for rehearing, basing its action solely upon authority of the opinion and judgment and writ of prohibition issued to it in the proceedings for a writ of prohibition heretofore mentioned (Rec. p. 262).

This petition for writ of certiorari is filed within less than ninety days subsequent to the entry of the order and judgment of June 29, 1946, finally terminating the pendency of this petitioner's appeal in the Court of Appeals of Alabama.

3. This petitioner founds his right in the Supreme Court of Alabama upon his right to have the Court of Appeals of Alabama exercise final appellate jurisdiction of his appeal from the Circuit Court of Clay County and says that it is a denial of due process of law for the Court of Appeals of Alabama to be prohibited from giving such consideration to his appeal and to the proceedings thereupon, if in the sound judicial discretion of the Court of Appeals of Alabama his appeal and the proceedings thereupon may be entitled to receive; that the Court of Appeals of Alabama being coerced by the writ of pro-

hibition issued by the Supreme Court of Alabama has abdicated its final appellate jurisdiction and has refused to consider and determine the matters and things which it had already taken under advisement; and your petitioner further says that he sincerely believes that if the Court of Appeals of Alabama were permitted to exercise its own sound judicial discretion in determining the merits of his application for rehearing filed December 19, 1945, that such rehearing would be granted and the judgment of the Clay County Circuit Court would be reversed; that the Supreme Court of the United States is the natural, logical authority to determine this question of jurisdiction which has arisen between the two highest courts of the State of Alabama; this question was not raised in the appeal of Amos Cotney in the Court below for the reason that it did not arise until the Court of Appeals of Alabama obeying the writ of prohibition issued by the Supreme Court of Alabama made and entered its order and judgment of June 29, 1946.

III.

STATEMENT OF THE CASE.

This petitioner was charged with murder in the first degree by indictment filed in the Clay County Circuit Court and was convicted of murder in the second degree and his punishment fixed at twenty years.

He perfected his appeal to the Court of Appeals of Alabama. The Court of Appeals of Alabama is vested with final appellate jurisdiction in such causes by virtue of the provisions of Section 140 of the Constitution of Alabama of 1901 and of Title 13, Sec. 86, Alabama Code of 1940.

Upon consideration of his appeal by the Court of Appeals of Alabama, it was the statutory duty of the Court of Appeals of Alabama to search the record for error

pursuant to the provisions of Title 15, Sec. 389 of the Code of Alabama of 1940, no assignments of error being necessary.

During the course of the trial of your petitioner in the Circuit Court of Clay County, Alabama, the widow of the person who was the subject of the homicide testified at great length with regard to the conduct of your petitioner and the deceased Buster Adams; the whole burden of her testimony tending to show that your petitioner assaulted Adams with a pistol and intentionally and purposefully and with deliberation and malice shot and killed her spouse, the said Adams. She also testified to a statement made by the decedent Adams after he received the fatal shot and while he was lying upon the ground suffering from the wound of which he later died, in which statement she said that her husband had said, "Don't shoot me again, Amos, you have killed me already." She also testified that this statement was made by the deceased Adams to her several times after Adams was removed to the hospital and within a period of three days prior to his death.

To rebut this testimony, the defendant brought two doctors who attended the deceased Adams while in the hospital, viz., Dr. L. G. Cole (Rec. pp. 49-53) and Dr. C. W. Moore (Rec. pp. 53-54A), and offered to show by each of these witnesses that the deceased had a conversation with them in the hospital, in the course of which the following was said: "That the deceased asked Dr. Cole if they put Amos Cotney in jail and he told him he didn't know"; then the deceased said, "Well, I hope they didn't; he is one of the best friends I ever had and I am sure this was an accident" (Rec. p. 51).

The Court of Appeals of Alabama in considering this matter in its opinion rendered on February 13th, 1945, considered the admissibility of this testimony, which the

trial court had rejected, solely upon the question as to whether or not the party offering this testimony had laid the proper predicate for its introduction as a dying declaration, and held that the proper predicate had not been laid.

The Court of Appeals of Alabama did not in its aforesaid opinion treat this testimony in the light of its being offered as impeaching testimony, tending to impeach the several statements arrtibuted to the decedent by his widow in her testimony.

The Supreme Court of Alabama upon review by way of writ of certiorari is limited to a consideration of the matter appearing on the face of the opinion written and filed by the Court of Appeals, and does not look to the record from the trial court filed in the Court of Appeals. The Supreme Court of Alabama has uniformly held that it can review the Court of Appeals of Alabama by way of common law writ of certiorari only and that this review is limited to the opinion of the Court of Appeals, and, if no opinion is rendered by the Court of Appeals, there is nothing to review.

In reviewing the aforesaid opinion of the Court of Appeals of Alabama by petition for writ of certiorari filed by the appellant the Supreme Court first denied the writ without an opinion. Then a rehearing was granted and on July 26, 1945, the Supreme Court of Alabama held, with regard to the foregoing testimony offered by your petitioner in the trial court, as follows:

> "We think the evidence was admissible as impeaching a prior statement attributed to deceased, and in evidence. We think that it was error, therefore, to exclude it whether or not it was admissible as a dying declaration."
>
> Cotney v. State, 26 So. (2d) 603, 605.

Thereafter the Supreme Court of Alabama, without having the full record of the appeal from the Circuit Court of Clay County to the Court of Appeals before it, and basing its opinion solely upon the facts as stated in the opinion of the Court of Appeals, did, on, to-wit, the 25th day of October, 1945, with two justices dissenting, set aside its judgment on October 25, 1945, and did render a judgment in words as follows:

> "It is, therefore, considered and ordered that the judgment of the Court of Appeals be and the same is hereby affirmed" (Rec. p. 225).

Your petitioner applied for a further rehearing, which further rehearing was denied on December 6, 1945.

During all of this time the mandate of the Court of Appeals to the Circuit Court of Clay County had not gone out. Said mandate having been recalled immediately upon filing of the petition for writ of certiorari. Within fifteen days after the denial of your petitioner's application for rehearing on December 6, 1945, and on the 19th day of December, 1945, within fifteen days, your petitioner filed his application for rehearing in the Court of Appeals of Alabama seeking to obtain its judgment upon the admissibility of the aforesaid testimony when considered in the light of its impeaching nature, a phase which had neither been discussed nor decided in the original opinion of the Court of Appeals.

It is the contention of the appellant that due process of law requires that he be given the benefit of the judgment of the Court of Appeals upon all questions apparent on the face of the record, and that it is within the final appellate jurisdiction of the Court of Appeals to determine what consideration it will give to any matter presented to it arising on the face of the record so long as the appeal remain in fieri in that court; and your petitioner con-

tends that this cause did remain in fieri in the Court of Appeals during all of the time action of the Court of Appeals on your petitioner's appeal was held in abeyance pending final determination of the issue made by the petition for writ of certiorari filed in the Supreme Court of Alabama, and thereafter until the Court of Appeals had by its remitter sent its mandate down to the Circuit Court of Clay County.

It is the contention of the petitioner that if the testimony of two doctors had been admitted in evidence the verdict of the jury would have been much more favorable to him and he would have been acquitted or, at least, would not have been convicted of murder.

Your petitioner contends that the denial on the part of the Court of Appeals of Alabama pursuant to the express order of the Supreme Court of Alabama contained in its writ of prohibition of its jurisdiction to render its judgment and opinion on the merits of your petitioner's application for a rehearing filed December 19, 1945, not resulting from the exercise of the Court of Appeals on sound judicial judgment and discretion, but resulting from coercion on the part of the Supreme Court of Alabama, amounts to a denial to this petitioner of that due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution in due process clause thereof.

IV.

ERRORS ASSIGNED.

1. The Courts of Alabama erred in denying to this defendant a judicial determination of matters and things apparent on the face of the record of his appeal.

2. The Court of Appeals of Alabama erred in denying to this petitioner the benefit of said court's independent judicial determination of the matters and things apparent on the face of the record of his appeal and presented to said Court of Appeals by the application for further rehearing filed December 19, 1945, which said application for rehearing had been heard orally and submitted upon argument of counsel and was dismissed by the Court of Appeals in obedience to a writ of prohibition issued by the Supreme Court of Alabama in excess of the jurisdiction of the Supreme Court of Alabama.

3. The Court of Appeals of Alabama erred in refusing to exercise its final appellate jurisdiction by adjudicating and determining the admissibility of the evidence offered from Doctors Cole and Moore at the trial of this petitioner in the Clay County Circuit Court as testimony tending to impeach statements attributed to the deceased victim of the homicide by his widow in her testimony presented at the trial of your petitioner.

V.

ARGUMENT.

POINT I.

The Alabama Court of Appeals has final appellate jurisdiction of all felonies where the punishment has been fixed at 20 years or under.

Const. of Ala., 1901, Sec. 140;
Code of Ala., 1940, Title 13, Sec. 140.

The correctness of this Proposition of Law is established by the mere reading of the Constitution of Alabama of 1901, Section 140, which is as follows:

> "Sec. 140. Except in cases otherwise directed in constitution, the supreme court shall have appellate jurisdiction only, which shall be co-extensive with the state, under such restrictions and regulations, not repugnant to this Constitution, as may from time to time be prescribed by law, except where jurisdiction over appeals is vested in some inferior court, and made final therein; provided, that the supreme court shall have power to issue writs of injunction, habeas corpus, quo warranto, and such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions."

Pursuant to constitutional mandate, the Legislature of Alabama enacted statutes which appear in the present Code as Sections 85 and 86, Title 13, Alabama Code, 1940, which said sections are as follows:

> "Sec. 85. Court of Appeals created.—A court of appeals, composed of three judges possessing the qualifications of the supreme court judges, is created and established."

> "Sec. 86. Jurisdiction of court.—Said court, except as to actions involving the title to or possession of

lands and except as herein otherwise provided, shall have appellate jurisdiction of all suits at law where the amount involved, exclusive of interests and costs does not exceed the sum of one thousand dollars, of all misdemeanors, including the violation of town and city ordinances, bastardy, habeas corpus, and all felonies, where the punishment has been fixed at twenty years or under. Where there is a recovery in the court below of any amount other than costs, the amount of such recovery shall be deemed to be the amount involved, otherwise the amount claimed shall be deemed to be the amount involved, except that in actions of detinue the alternate value of the property as found by the court or jury shall be deemed to be the amount involved."

It thus appears that there is no question but that the Court of Appeals has final appellate jurisdiction in "all felonies where the punishment has been fixed at 20 years or under."

POINT II.

The Supreme Court of Alabama has power to issue writs of injunction, habeas corpus, quo warranto, and such other remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions.

Const. of Ala., 1901, Sec. 140.

POINT III.

The jurisdiction of the Supreme Court of Alabama to review the judgments and decisions of the Court of Appeals of Alabama is by way of common law certiorari, and is limited to a review of the opinion of the Court of Appeals, and is not extended to the record brought up to the Court of Appeals from the trial court.

Tillison v. State, 27 So. 2d 43;
Lancaster v. State, 106 So. 617, 214 Ala. 2;

Ex Parte State, Ex Rel. Davis, 94 So. 274, 208 Ala. 439;
Ex Parte Stanley, 88 So. 449, 205 Ala. 431;
Ex Parte Pollard, 69 So. 425, 193 Ala. 32;
Price v. Court of Com'rs Marshall County, 65 So. 163, 186 Ala. 611;
Kirkwood v. State, 63 So. 990, 184 Ala. 9;
Ex Parte State, 61 So. 53, 181 Ala. 4;
Rainey v. State, 17 So. 2d 687, 245 Ala. 458;
Barnes v. State, 14 So. 2d 246, 244 Ala. 597;
Andrews v. City of Birmingham, 22 So. 2d 41 (2nd Case), 246 Ala. 668;
Vincent v. State, 22 So. 2d 344;
Newman v. State, 9 So. 2d 446, 243 Ala. 256;
Ingram v. State, 3 So. 2d 434, 241 Ala. 455;
O'Rielly v. State, 179 So. 263 (First Case), 235 Ala. 328;
Hanson v. State, 168 So. 700, 232 Ala. 585;
Ala. Dig., Vol. 7, Crim. Law, Key No. 1179.

A brief review of the authorities cited in support of this point is sufficient to establish its correctness as a matter of law. The Supreme Court of Alabama has uniformly held that it will not review the Court of Appeals except upon the principles established by common law for a proceeding in certiorari and that this common law certiorari will be limited to a review of the Opinion of the Court of Appeals only, and in the absence of an Opinion written by the Court of Appeals there is nothing to be reviewed by the Supreme Court of Alabama on petition for writ of certiorari. **O'Rielly v. State**, 179 So. 263 (First Case), 235 Ala. 328. Under the limited review of the Supreme Court of the decisions of the Court of Appeals, questions not specially treated or discussed in the Opinion of the Court of Appeals are not before the Supreme Court for consideration on petition for certiorari. **Newman v. State**, 9 So. 2d 444, 243 Ala. 256. On certiorari to Court of Appeals the Supreme Court will review only questions of law

presented by the Opinion of the Court of Appeals. **Gandy v. State**, 198 So. 267, 240 Ala. 202.

POINT IV.

The common law writ of certiorari reaches only to the jurisdiction of the subordinate tribunal and the regularity of its proceedings and can only correct errors of law apparent upon the face of the record.

N. Felis v. Royal Harness & Saddlery Co., 54 So. 504, 170 Ala. 160;
Lamar v. Com'rs Court, Marshall County, 21 Ala. 772;
Cushman v. Com'rs Court, Blount County, 49 So. 311, 166 Ala. 227;
Max J. Winkler Brok. Co. v. Courson, 49 So. 341, 160 Ala. 374.

POINT V.

At common law the judgment in certiorari was either to quash the proceedings reviewed, or to sustain them.

Max J. Winkler Brok. Co. v. Courson, 49 So. 341, 160 Ala. 374;
Fore v. Fore, 44 Ala. 478;
Towns v. Malone, 116 So. 131, 217 Ala. 273;
14 C. J. Secundum 123.

It is to be observed at this point that the Supreme Court of Alabama exercises no appellate jurisdiction in felonies where the punishment is fixed at 20 years or under, and the authorities hereinbefore cited in support of the foregoing points of law are sufficient to establish beyond all peradventure that the general constitutional provision of superintendency possessed by the Supreme Court, giving it the right to exercise a jurisdiction to superintend the Court of Appeals, can in no sense be interpreted as giving it an appellate jurisdiction in such felonies. Indeed, the

Supreme Court of Alabama, has, as we have seen, expressly determined that its power of jurisdiction over the Court of Appeals is limited to review of the Opinion of the Court of Appeals by common law certiorari, and that this provision of review does not extend to and include the power on the part of the Supreme Court to look beyond the opinion of the Court of Appeals and go into the record of the trial court. It has no power to review any matter except those questions appearing on the face of the Opinion rendered by the Court of Appeals.

Since the power and jurisdiction of the Supreme Court of Alabama extends only to its right to superintend the Court of Appeals, it necessarily follows that its judgments rendered upon petitions for writs of certiorari to the Court of Appeals is limited to those judgments which were proper to be rendered at common law on writs of certiorari. The Supreme Court has from the beginning held that the only judgment to be rendered upon a petition for writ of certiorari is a judgment sustaining the proceedings of the court below, i. e., denying the writ, or a judgment correcting the proceedings of the court below, i. e., quashing the proceedings and granting the writ of certiorari.

Since the remedy of certiorari is a discretionary remedy, and since it has never been understood that a judgment upon petition for writ of certiorari denying the writ, amounted to any more than a mere declaration by the Supreme Court that it would not exercise its discretion, it cannot be supposed that power to review a lower tribunal by way of a writ of certiorari can be considered as power to exercise appellate jurisdiction and render judgments in the matter of an appeal where the final jurisdiction is vested by Constitution and Statutes in such inferior court. It therefore follows that the Supreme Court of Alabama exceeded its jurisdiction and rendered a judg-

ment which is void upon its face when it proceeded to render a judgment upon the petition for certiorari filed by Cotney and directed to the Court of Appeals of Alabama, ordering and adjudging that **"the judgment of the Court of Appeals be affirmed"**; the only constitutional power that the Supreme Court of Alabama has was the constitutional power to quash the writ of certiorari and to sustain the regularity of the judgment and opinion of the Court of Appeals there presented.

Speaking of the function of a common law writ of certiorari, the Editor of Corpus Juris Secundum said:

> "The common law writ is not a broad or flexible remedy in as much as all that can be done under it is to quash or to refuse to quash the proceedings complained of." 14 C. J. S. 123.

The attention of the court is directed to the fact that decisions construing the jurisdiction of a superior tribunal acquired under statutory proceedings in certiorari are not in point here. For instance the jurisdiction of the Supreme Court of the United States in a statutory proceeding in certiorari such as here presented has general appellate jurisdiction. But this is not true in the common law certiorari proceeding by which the Supreme Court of Alabama reviewed the opinion of the Court of Appeals of Alabama.

POINT VI.

The Court of Appeals of Alabama has full appellate power and jurisdiction to correct, modify, vacate, or reconsider its judgments so long as the cause in which the judgment was rendered remains in fieri in the Court of Appeals.

> City of Birmingham v. Andrews, 132 So. 877, 34 C. J. 212-214, and multitudinous authorities cited in Note 13, 34 C. J. 214.

The editors of Corpus Juris have summed up the rule with regard to the jurisdiction of a court at common law to modify, vacate or reconsider its judgments in the following statement:

> "At common law, and in the absence of a statutory changing the rule, jurisdiction over the cause ceases with the expiration of the term at which final judgment was rendered, and thereafter the court has no power to correct or amend the judgment, and a fortiori the court has no power after expiration of the term to open or vacate the judgment except in either case pursuant to proceedings begun within the proper time and continued to the subsequent term; in such cases the proceedings remain in fieri, and the court may open, amend or vacate the judgment at a subsequent term." 34 C. J. 210-214.
>
> "For as long as the court has control over the proceeding it has the inherent power and of its own motion to set aside a verdict and grant a new trial." City of Birmingham v. Andrews, 132 So. 877 at 879.

The case of the City of Birmingham v. Andrews, supra, is also authority for the proposition that the discontinuance of a cause so long as it is in fieri can only be predicated upon some basic act of the actor in it, or the omission of some precedent duty enjoined by law and that the failure to enter an order of continuance of a cause thus in fieri does not as a rule create a chasm at the end of the term thereby effecting a discontinuance. Applying these rules, which have been uniformly and consistently adhered to by the Supreme Court of Alabama, to the instant case it would appear that when the rehearing of the appeal of Cotney v. State, 7th Division, 819, was denied by the Court of Appeals of Alabama on March 13, 1945, the Court of Appeals of Alabama had full power over its judgment until the end of that term which expired on June 30, 1945. If neither party to that appeal had done anything to keep

this case alive and the Court of Appeals of Alabama had done nothing of its own motion to keep the case alive, the power of the Court of Appeals of Alabama over the judgment in the Cotney case would have expired on June 30, 1945.

However, the power of the Court of Appeals of Alabama was kept alive by the action of Cotney in going to the Supreme Court of Alabama with a petition for a writ of certiorari to review and reverse the opinion and judgment rendered by the Court of Appeals of Alabama on February 13, 1945. When this petition for writ of certiorari was filed in the Supreme Court of Alabama the status of the appeal of Cotney v. State of Alabama, 7th Division, 819, was frozen and the power of the Court of Appeals of Alabama to exercise jurisdiction over that cause was suspended pending the time when the Supreme Court of Alabama should finally determine and dispose of the petition for the writ of certiorari. This is true of necessity. If it were not true, then the Court of Appeals of Alabama would not have had jurisdiction on July 26, 1945, to have entered an order vacating its judgment of February 13, 1945; and to have entered an order and judgment in compliance with the judgment rendered by the Supreme Court of Alabama in Case No. ..., 7th Division, 829, on the 26th day of July, 1945. Certainly the Court of Appeals of Alabama had jurisdiction of the appeal of Cotney v. State on July 26, 1945, and had power to vacate its original judgment of affirmance and enter a judgment of reversal pursuant to the writ of certiorari granted the petitioner, Amos Cotney, by the Supreme Court of Alabama on that date. If the Court of Appeals of Alabama had jurisdiction of the cause; if the cause of Cotney v. State, 7th Division, 819, was in fieri in the Court of Appeals on July 26, 1945, for the purpose of the exercise of jurisdictional power by the Court of Appeals to vacate the judgment of February

13, 1945, and enter a new judgment not in conflict with the law as declared by the Supreme Court in its decision handed down on July 26, 1945, then the Court of Appeals had jurisdiction on October 25, 1945, when the Supreme Court of Alabama rendered its judgment vacating the writ of certiorari granted in its judgment of October 25, 1945, and entered a judgment which in legal effect amounted to a judgment quashing the writ of certiorari; if the Court of Appeals of Alabama had jurisdiction on October 25, 1945, then it had jurisdiction when the further rehearing of the certiorari proceedings was decided by the Supreme Court of Alabama on December 5, 1945.

If the Court of Appeals had jurisdiction on December 6, 1945, it then had jurisdiction of the appeal of Amos Cotney until the expiration of that term of the court which was then in session and it appears from the pleadings in this case that the term of the Court of Appeals of Alabama beginning in October, 1945, did not expire until June 30, 1946.

It is respectfully submitted that the full control of the proceedings in the matter of the appeal of Cotney v. State, and full power or jurisdiction over them was retained by the Court of Appeals of Alabama on December 19, 1945, since at that time the proceedings were not remitted to the Circuit Court of Clay County for execution of the judgment of the Circuit Court of Clay County.

The mandate was then and there held in the control of the Court of Appeals of Alabama and the Circuit Court of Clay County had no power or control over the matter until the Court of Appeals remitted the cause to it.

We respectfully urge and submit that there is no statute in Alabama limiting the power of the Court of Appeals of Alabama over its own judgments. Its power over its own judgments and its own proceedings is de-

termined by the principles of common law and by the Constitution of Alabama and the statutes enacted pursuant thereto and hereinbefore cited in support of Point I of this brief, none of which affect in any way the power of the Court of Appeals to control its own opinions and judgments so long as they are not in conflict with the law of the land as declared by the Supreme Court of Alabama.

POINT VII.

The action of the Court of Appeals of Alabama in permitting the application for rehearing of December 19, 1945, to be filed, setting the same down for oral argument and hearing oral argument upon its merits, amounted to an exercise of the judicial discretion of the court to entertain and determine whether such application for rehearing should be granted.

Alabama Supreme Court Rule 38, Volume 7;
Constitution of Alabama 1940.

It is respectfully submitted that no litigant in the Court of Appeals of Alabama may, under Rule 38, **demand the right** to file a second application for rehearing. Yet Rule 38 is not a limitation upon the power and jurisdiction of the Court of Appeals to entertain an application for rehearing whether filed in strict compliance with Rule 38 or whether it be filed without such compliance. Indeed, under the principles of common law, so long as the Court of Appeals has power over its judgment, has not remitted the cause brought to it on appeal back to the court from which the appeal was taken; so long as it retained its mandate of affirmance under its own control, the Court of Appeals of Alabama had full power and jurisdiction to consider and determine whether or not it had overlooked any material element of the appeal and to consider and determine whether or not it had failed to give effect to any principle

of law, and to correct its judgment if it is found that the judgment was the result of a failure on its part to take into consideration a material principle of law.

The Court of Appeals of Alabama so understood its duty in the premises when it received this appellant's application for a rehearing filed on December 19, 1945. The Court of Appeals of Alabama began to function as a court in and about its consideration of said second application for rehearing; while it was thus functioning, and after it had heard oral argument, and while the matter presented by this application for rehearing was in the breast of the Court of Appeals for decision, the Supreme Court of Alabama rendered its judgment on the writ of prohibition ousting the Court of Appeals from the further exercise of its own independent final appellate jurisdiction.

POINT VIII.

The refusal of a court to adjudicate a matter within its jurisdiction is a denial of due process of law.

Van Dyk v. Van Dyk, 33 N. Y. S. (2d) 766;
In re Central R. Co. of New Jersey, 136 Fed. (2d) 633, 54, 64 S. Ct. 437, 320 U. S. 805, 88 L. Ed. 486;
New York v. Wilson, 63 S. Ct. 840, 317 U. S. 688, 87 L. Ed. 1083;
Wilson v. State, 51 N. E. (2d) 848.

It is respectfully submitted that when the Court of Appeals of Alabama entered its order of June 29, 1946, it abdicated its duty and responsibility as the final appellate court of Alabama in the nature of the appeal of Cotney v. State, 7th Division 819.

Had the Court of Appeals of Alabama exercised its own sound discretion and in the exercise of that sound discretion adjudicated that the application for rehearing was of such little merit that it did not justify the Court of Appeals of

Alabama permitting the same to be filed, then this appellant would have been at his road's end.

But the Court of Appeals of Alabama did permit the application for rehearing to be filed and the Court of Appeals of Alabama did determine that there was ~~probable~~ ~~no~~ merit in such application for rehearing that it set the matter down for oral argument and the Court of Appeals of Alabama did thereupon proceed judicially to function in determining the merits of said application for rehearing as it had full final appellate jurisdiction to function.

The order entered by the Court of Appeals of Alabama on June 29, 1945, was a necessary order to be entered by that court; until that order was entered the appeal of Amos Cotney, 7th Division 819, continued in fiere in the Court of Appeals of Alabama. The Court of Appeals of Alabama was compelled to exercise the jurisdiction over the appeal of Cotney v. State, 7th Division 819, on June 29, 1946, before the mandate of the Court of Appeals of Alabama remitting the cause to the Circuit Court of Clay County, Alabama, could go down to the lower court. This order of June 29, 1946, was essential and necessary to terminate the cause in the Court of Appeals of Alabama.

It is respectfully submitted that this order was not entered, and it appears on the face of this record that it was not entered in the exercise of the judicial judgment of the Court of Appeals of Alabama by its judges. This order was entered by the Court of Appeals of Alabama not as a result of their own judicial deliberations and adjudications, but was entered under the coercion and duress of an order coming down to the two judges of the Court of Appeals of Alabama from the Supreme Court of Alabama, and so recites.

In the interest of comity between the two courts it can be understood that the two judges of the Court of Appeals of Alabama would not defy the Supreme Court of Alabama but would leave the matter of their jurisdiction in the

premises to be determined by the Supreme Court of the United States upon the question of due process of law. The Supreme Court of the United States is the natural arbiter of this conflicting claim of jurisdiction between the two high courts of the State of Alabama.

The right of a litigant to have the judgment of the court having the jurisdiction over his controversy is an essential element of due process of law. That this is true requires no citation of authority.

This litigant has never had any decision of the Court of Appeals of Alabama upon the question of the admissibility of the evidence which he offered by the two doctors—Cole and Moore—when considered as impeaching testimony. The Court of Appeals of Alabama completely overlooked the tendency of this evidence to impeach the statements attributed to the deceased, Adams, by the widow. Not a word with regard to its effect as impeaching testimony appears in the opinion of the Court of Appeals.

The Supreme Court of Alabama had no right to review or consider the legal effect of any facts appearing in the record of the appeal of Amos Cotney—the Supreme Court of Alabama could consider only the legal effect of the matters and things set out in the opinion of the Court of Appeals of Alabama. The appellant Cotney contends now and contended on his application for rehearing filed December 19, 1945, that this testimony was available to him as impeaching testimony. He contended then and contends now that there are facts and circumstances in the record of the appeal from the Circuit Court of Clay County, Alabama, which when considered by the Court of Appeals of Alabama and understood by the Court of Appeals of Alabama will cause the Court of Appeals of Alabama to determine that it was error for the trial court to deny to this appellant the benefit of the testimony of the two doctors mentioned with regard to the statement made to them by the decedent, Adams.

There are many pages in the record of the appeal which was before the Court of Appeals of Alabama dealing with the offer of this testimony; there are many pages of the testimony of the widow of the decedent, Adams, which must be considered in order to determine the admissibility of this testimony.

The Court of Appeals of Alabama overlooked and failed to consider these facts and circumstances as applied to the admissibility of the rejected testimony when considered in the light of its impeaching nature. The opinion of the Court of Appeals of Alabama very briefly sets out only a small fragment of the facts in this regard; and these facts are set out and so arranged as to illustrate only the point that the appellant had failed to qualify the testimony as a dying declaration.

When, upon the remand of this cause, it was brought to the attention of the Court of Appeals by the motion for rehearing filed December 19, 1945, that the Court of Appeals had overlooked and failed to consider the admissibility of this testimony as an impeachment of the testimony attributed to the dead man by his widow, the Court of Appeals of Alabama, in its high and commendable zeal to do full justice, took jurisdiction of the application for rehearing and proceeded to hear argument upon this point. The Supreme Court of Alabama had already declared in its opinion of July 26, 1945, that

> "there is a well-established rule that a dying declaration may be impeached by evidence of another statement by the deceased at another time though he was not then impressed that his death was inevitable." Cotney v. State, 26 So. (2d) 603 at 605.

We have seen the Supreme Court of Alabama could only apply the law to the facts as stated in the opinion of the Court of Appeals. The Supreme Court of Alabama by its oft repeated decisions has declared that it has no author-

ity to make a finding of fact nor to consider any matter not presented in the opinion of the Court of Appeals; that it is the sole function of the Court of Appeals to make its findings of fact.

The Court of Appeals recognizing that it had not made any finding of fact with regard to the admissibility of the questioned testimony as an impeachment of the alleged dying declarations, naturally in the interest of justice proceeded immediately to assume jurisdiction to determine whether or not, upon the facts of this whole record on the appeal to it, such testimony was admissible.

It is, therefore, respectfully submitted that when the Court of Appeals of Alabama abdicated its jurisdiction because of the fact that its two judges had been prohibited from further exercising jurisdiction, this petitioner, the appellant in that court, was denied due process of law in that he was denied his constitutional right to have the court of final appeals in his case adjudicate for itself each and every question presented to it in controversy. This petitioner could not waive this right. The statutes of Alabama provide that it is the mandatory duty of the Court of Appeals to search the record for error and that an appellant in a criminal case is not required to point out the error nor to argue the error. Title 15, Sec. 389, Code of Alabama 1940.

The Court of Appeals of Alabama having overlooked and failed to treat this alleged error in the light of the impeaching character of the testimony offered was doing no more than its bounden duty under provisions of Title 15, Sec. 389, Code of Alabama 1940, when, the cause being in fieri, it proceeded to consider, hear argument, and take under advisement the matter presented by the application for rehearing filed December 19, 1945.

It is the refusal of the Court of Appeals of Alabama acting under duress of the writ of prohibition directed to the two judges of the Court of Appeals of Alabama by

the Supreme Court of Alabama, to adjudicate the controversy between this appellant and the State of Alabama upon the merits of the application for rehearing and the motion to strike the same which it took under advisement when it heard oral argument thereupon on the 28th day of February, 1946, of which petitioner complains. This appellant is entitled to the free and deliberate consideration of the Court of Appeals of Alabama upon this matter. If the Court of Appeals of Alabama should err in its decisions, the State of Alabama has ample remedy within the doctrine of due process of law by petition for writ of certiorari.

POINT IX.

The Supreme Court of Alabama was without constitutional power to oust the Court of Appeals of Alabama from exercising its final appellate jurisdiction by giving such consideration to petitioner's application for rehearing filed December 19, 1945, as in the sound judicial discretion of the Court of Appeals such application for rehearing was entitled to receive.

34 C. J. 213, Para. 437;
14 C. J., Cer. Para. 108, p. 245, and also cases cited in support of Points I-VII;
Dissenting Opinion Ex Parte State Ex Rel. Attorney General (Cotney v. State), 26 So. (2d) 608, 610.

It is respectfully submitted to the Supreme Court of the United States that the dissenting opinion rendered by Simpson, Justice, in Ex Parte State Ex Rel. Attorney General, 26 So. (2d) 608 at 610, is the sound rule to be applied in this case.

The Supreme Court of Alabama had full power under the Constitution to direct and instruct the Court of Appeals of Alabama as to the correct principles of law to be

employed by the Court of Appeals of Alabama in arriving at its judgments and the Court of Appeals of Alabama is bound under the law to follow the rules of law announced by the Supreme Court of Alabama in arriving at its judgments; but the Supreme Court of Alabama cannot render any judgment in the matter of an appeal placed by the Constitution and the statute within the exclusive final appellate jurisdiction of the Court of Appeals nor can the Supreme Court of Alabama oust the Court of Appeals of Alabama from the exercise of this final appellate jurisdiction.

The effect of the judgment of the Supreme Court of Alabama in the matter of Ex Parte State Ex Rel. Attorney General, 26 So. (2d) 608, was to render a judgment ousting the Court of Appeals of Alabama from the exercise of its own final appellate jurisdiction in the matter of the appeal of Cotney v. State.

The acquiescence of the Court of Appeals of Alabama and its abdication as evidenced by the order rendered by the Court of Appeals on June 29, 1946, is the denial of due process of law of which we complained of here; that the Court of Appeals of Alabama retained jurisdiction pending final determination of the certiorari proceedings instituted by Cotney in the Supreme Court of Alabama is demonstrated hereinbefore.

> "It is likewise unsound to construe the case of Minto v. State, 9 Ala. App. 95, 64 So. 369; Ex Parte Minto, 187 Ala. 671, 65 So. 516, as authority for holding that jurisdiction of the Court of Appeals ended in the cause with the end of the term of court at which the judgment was rendered. This, for the reason that the certificate of affirmance was withdrawn, on application for rehearing duly made in that court, and the proceedings remained in fieri during the successive steps taken in the cause during the present time. 34 C. J. 213, Para. 437; 14 C. J. S., Cer. Para. 108, p. 245." Ex Parte State, 26 So. (2d) 608 at 611.

The appeal of Amos Cotney remaining in fieri as stated by Justice Simpson in the last foregoing excerpt from the opinion in ex parte State, supra, it is obvious that the Court of Appeals of Alabama had full power and jurisdiction to consider any matter which had been overlooked by the Court of Appeals in arriving at its original judgment and opinion rendered February 13, 1945. 26 So. (2d) 598.

We direct the attention of the Supreme Court of the United States to the particular fact that Mrs. Adams, widow of the deceased, Adams, not only testified with regard to an alleged statement made by the deceased, Adams, at the time that he was shot, but also testified to several statements made to her by the decedent during the period when the deceased was in the hospital at Talladega. These last mentioned statements of the deceased made at the hospital could not be considered as part of the res gestae. The Court of Appeals of Alabama in its opinion rendered on general affirmance said:

> "The lower court held that in the effort made by appellant to introduce an alleged dying declaration of deceased, a proper predicate was not proven for the introduction of same. This is the only question presented by the record that merits our discussion." Cotney v. State, 26 So. (2d) 598.

We have seen that under the statute of Alabama the Court of Appeals was bound to search the record for error; that error apparent on the face of the record cannot be waived by the appellant in a criminal case; that the Supreme Court of Alabama by its uniform decisions has limited its review on certiorari to the facts stated in the opinion of the Court of Appeals subject to review by certiorari, and cannot look into the original record from the Circuit Court filed in the Court of Appeals. Since the Court of Appeals of Alabama by the foregoing statement had limited its consideration of Cotney's appeal solely to

the question of whether the testimony offered from the witnesses, Doctors Cole and Moore, was admissible as a dying declaration, the Supreme Court of Alabama, upon its review, was limited to that question. This petitioner has never had any consideration by the Court of Appeals of Alabama of the admissibility of this evidence as evidence tending to impeach the alleged dying declarations of the deceased, Adams, made at the time of the shooting or the alleged dying declarations of the deceased, Adams, alleged to have been made to his widow on the several occasions when she swears that she talked to him at the hospital.

Upon this petitioner directing the attention of the Court of Appeals to the fact that it had overlooked a consideration of the admissibility of this testimony in the light of its impeaching character, the Court of Appeals of Alabama assumed jurisdiction of the motion filed December 19, 1945, and proceeded to hear oral argument thereupon. The Court of Appeals of Alabama very properly decided to do its full duty pursuant to the statute which requires it to search the record for error in criminal appeals, and having overlooked this phase of the matter involved, appeared ready and was ready to give full consideration thereto; that this testimony was admissible as an impeachment of the dying declarations attributed to the dead man by his widow and also tended to discredit the witness' testimony with regard to the facts constituting the res gestae, is clearly declared by Mr. Justice Foster in the opinion rendered on certiorari in the Supreme Court of Alabama, July 26, 1945, wherein Justice Foster declared that:

> "There is a well-established rule that a dying declaration may be impeached by evidence of another statement by the decedent at another time though he was not then impressed that his death was inevitable." Cotney v. State, 26 So. (2d) 603-605.

The Court of Appeals of Alabama was apparently impressed with the idea that it had a duty to consider all the facts and circumstances displayed by the entire record coming to it from the Circuit Court of Clay County and upon such consideration determine whether, under the foregoing rule with regard to the admissibility of statements tending to impeach dying declarations, the questioned testimony of Doctors Cole and Moore should have been admitted. The Court of Appeals of Alabama having had the writ of prohibition issued by the Supreme Court of Alabama served upon it and upon the two judges thereof, could very properly have refused to obey this writ on the ground that the Supreme Court of Alabama had no constitutional power to oust the Court of Appeals from the exercise of its constitutional and statutory function of final exclusive appellate jurisdiction of the appeal of Amos Cotney. Such action on the part of the Court of Appeals of Alabama would have resulted in a very undesirable collision between the two courts of last resort in the State of Alabama.

It is very likely that in the considered judgment of the Court of Appeals of Alabama public policy and the interest of comity between the courts suggested that it was better for the Court of Appeals to bow to the coercive writ and for the moment abdicate its jurisdiction and remit the appellant, Amos Cotney, to his remedy in the Supreme Court of the United States upon the basis of the denial by the Court of Appeals as a violation of his right to have the judgment of the Court of Appeals, pursuant to the due process clause of the Federal Constitution. As we have pointed out, good state policy makes the Supreme Court of the United States the natural arbiter of such a question.

It is not desirable to have the Court of Appeals and the Supreme Court of Alabama in open collision with each other as to their respective authority and jurisdic-

tion. Each of these courts are bound to acknowledge the authority of the Supreme Court of the United States and each of these courts will cheerfully obey the rulings of the Supreme Court of the United States. A decision by the Supreme Court of the United States determining their respective jurisdictions in this particular case will avoid the creation of bad feeling between the two courts, and we are confident will obtain for this appellant a judicial determination by the Court of Appeals of Alabama that the questioned testimony of Doctors Cole and Moore was admissible as impeaching testimony and that its exclusion constituted reversible error.

A full examination of the record in the Court of Appeals and a statement of facts with regard to the impeaching character of this testimony, and a finding of fact by the Court of Appeals of Alabama that the testimony was offered generally and not for any specific purpose, will then bring this case within the rule announced in the original opinion rendered by Justice Foster in Cotney v. State, on July 26, 1945, 26 So. (2d) 603, at 605, and will result in a reversal of this case.

CONCLUSION.

It is respectfully submitted that there is no word in the proceeding with regard to the testimony of Doctors Cole and Moore justifying a finding of fact that the petitioner offered their testimony for any specific purpose. The testimony was offered generally. The proceedings with reference to its offer showing that the only objection made to the testimony was that the defendant had not laid the predicate to show that it constituted a dying declaration. The argument over this phase of the testimony nowhere waived its admissibility as an impeaching statement. The fact that defendant argued that the objection made by the State to its introduction was not sound did not amount to a waiver of its offer generally.

In the examination of Dr. L. G. Cole, Record page 50, the matter was first brought up, the proceedings being as follows:

> "Did he have anything to say to you with reference to Mr. Cotney and his friendship toward Mr. Cotney?
>
> "By Mr. Hardegree: We object to that on the general grounds and on the ground that there has been no dying declaration shown and it is wholly inadmissible."
>
> Rec. p. 50.

From that point on the argument was devoted to a discussion of the tendencies of the evidence with regard to the establishment of a predicate for a dying declaration. The State had not objected to this question on the ground that it was not an impeachment. The defendant had not limited his offer of this statement to its admissibility as a dying declaration and it came clearly within the rule announced by Justice Foster in the opinion rendered July 26, 1945, in the following language:

> "But if evidence is offered generally, and it is excluded, but it is admissible for a certain purpose, it is error to exclude it. Collins v. Jones, 83 Ala. 365, 3rd So. 591." Cotney v. State, 26 So. 2 (d) 603 at 605.

It is respectfully submitted that the testimony of the widow, Mrs. Adams, wherein she testified at great length and in great detail was highly injurious to this petitioner's defense and was no doubt the chief inducement to the jury's verdict against this petitioner.

The natural sympathetic appeal of a widow to a jury, coupled with the strong and forceful testimony of this widow, were bound to produce a strong impression upon the jury. Yet, in the face of such strong testimony on the part of the widow the jury could not bring themselves to

a satisfaction of their consciences by rendering a verdict convicting this petitioner of murder in the first degree and gave him the lowest penalty prescribed by law for murder in the second degree.

The widow's testimony with regard to the several dying declarations of decedent was not disputed in the record. An impeachment of her testimony with regard to these alleged dying declarations by two disinterested witnesses of high standing and repute would have demolished the force of her testimony in the minds of the jury. With her testimony thoroughly discredited the mere reading of the record would seem to be sufficient to convince a reasonable man that a jury could have done nothing less than return a verdict for the defendant upon his plea of self-defense.

We respectfully submit that if the Court of Appeals of Alabama be permitted to reconsider their judgment rendered February 13, 1945, and to reconsider and amend or modify their opinion rendered in support of said judgment, the Court of Appeals will, upon an inspection of the record in this case, make a finding of fact that the testimony of Doctors Moore and Cole was offered generally and following the rule announced by Justice Foster in Cotney v. State, supra, will hold that its exclusion constituted reversible error.

We respectfully submit that this petitioner has demonstrated his right to have the independent, exclusive, untrammelled, and unfettered judgment of the Court of Appeals of Alabama as to whether the Court of Appeals of Alabama will exercise its judicial discretion to review its opinion rendered February 13, 1945, and that the denial to this petitioner of that right is a denial of due process of law, whether such denial is the result of duress and coercion of a superior tribunal ousting the inferior tribunal from the exercise of its duty or whether it should

result from an arbitrary refusal is a matter of little consequence. The Court of Appeals of Alabama had the exclusive jurisdiction to determine what, if any, consideration would be given to the application for rehearing filed December 19, 1945, and it did proceed to a consideration thereof; while engaged in the consideration thereof and before the announcement of its adjudication of the questions presented thereby, its hand was stayed by a coercive writ issued out of the Supreme Court of Alabama and bowing to the Supreme Court of Alabama it has abdicated its jurisdiction as evidenced by its order entered June 29, 1946.

The result is that the Supreme Court of Alabama has pointed out a clear reversible error, not mentioned in the opinion of the Court of Appeals, and, therefore, not subject to correction on writ of certiorari by the Supreme Court, and on the other hand has denied to the Court of Appeals of Alabama the power to correct a judgment and render a righteous judgment by considering the matter which it overlooked in its original opinion, and this petitioner, having the right to rely upon the statute which made it the duty of the Court of Appeals of Alabama to search the record for error, is to be confined for a period of twenty years of servitude in the penitentiary of Alabama as the result of an oversight on the part of the Court of Appeals of Alabama which the Court of Appeals of Alabama apparently desires to correct, but which the Supreme Court of Alabama has forbidden it to do. This petitioner, unless he receives relief from the Supreme Court of the United States, will constitute another victim of the technicalities of the law with respect to criminal procedure.

We cannot believe that the Supreme Court of the United States will permit such to occur and submit this petition with full confidence that the Supreme Court of the United States will issue its writ of certiorari correcting the judg-

ment of the Court of Appeals of Alabama and declaring the testimony of Doctors Cole and Moore to have been admissible testimony and the exclusion thereof to have constituted reversible error. The Supreme Court of the United States is reviewing the opinion of the Court of Appeals of Alabama in the exercise of a statutory jurisdiction giving it the right to examine the entire record in the Court of Appeals of Alabama; the Supreme Court of the United States is not limited to the opinion of the Court of Appeals as was the Supreme Court of Alabama in its review by way of writ of certiorari.

The Supreme Court of Alabama held in its first opinion rendered by Justice Foster that the exclusion of the testimony of Doctors Moore and Cole constituted reversible error. On the second rehearing when the attention of the Supreme Court of Alabama was directed to the fact that the Court of Appeals of Alabama in its original opinion had said that:

> "The lower court held that in the effort made by appellant to introduce an alleged dying declaration of deceased a proper predicate was not proven for the introduction of same. This is the only question presented by the record that merits our discussion."—Cotney v. State, 26 So. (2d) 598,

and the Supreme Court of Alabama, therefore, being limited to a consideration of the sole question considered by the Court of Appeals, could not maintain its original opinion of July 26 and, of course, under its limited power of review could make no finding of fact, but was compelled to rely upon the finding of fact and statements of questions considered contained in the opinion of the Court of Appeals. That resulted in the Supreme Court of Alabama rendering its judgment of October 25, 1945, which concluded with the words:

"The rehearing is granted and the judgment of the Court of Appeals is affirmed."—Cotney v. State, 26 So. (2d) 603, at 607.

It therefore appears that this petitioner's unhappy situation results from two things:

(a) The Court of Appeals in its original opinion overlooked the tendency of the offered evidence as impeaching testimony and limited its review to the admissibility of said testimony as a dying declaration, thereby limiting the scope of review on the part of the Supreme Court of Alabama, and

(b) The Supreme Court of Alabama, having no power under common law principles of the scope of a writ of certiorari to anything but grant the writ and quash the judgment of the court below or deny the writ, thereby leaving the judgment of the Court below undisturbed, used language which would be appropriate to be used in concluding its judgment if the matter had been before the Supreme Court of Alabama on an appeal, and attempted to affirm the judgment of the Court of Appeals, thereby attempting to shut off any further consideration of Cotney's appeal by the Court of Appeals.

Betwixt this oversight on the part of the Court of Appeals of Alabama and the limited power of review on the part of the Supreme Court of Alabama, coupled with the successful attempt to oust the Court of Appeals from the exercise of its final jurisdiction to correct a matter which it has overlooked, this petitioner stands in grave danger of losing his liberty for twenty years.

The petitioner is entitled under the law of the State of Alabama to have the judgment of the Court of Appeals upon every error apparent upon the face of the record. He is entitled to have the Court of Appeals of Alabama exer-

cise its exclusive final appellate jurisdiction pursuant to the Constitution and statutes of the State of Alabama. The Court of Appeals of Alabama apparently stood ready to correct this oversight.

Will the Supreme Court of the United States follow the example of the Supreme Court of Alabama and deny the Court of Appeals of Alabama the power and right to correct a clear oversight and do justice without regard to technicalities of law? We have no doubt that the Supreme Court of the United States will hold, first, that the proffered testimony of Moore and Cole was admissible; second, that its exclusion constituted error to reverse; third, that the Court of Appeals of Alabama has final appellate jurisdiction in the appeal of Cotney v. State and power to consider and determine any question of fact overlooked in its original opinion; fourth, to apply the rule of law declared by the Supreme Court of Alabama with respect thereto.

Respectfully submitted,

.....

G. ERNEST JONES,
Counsel for Petitioner.

.....

RODERICK BEDDOW,
Of Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 525

AMOS COTNEY,

Petitioner,

vs.

STATE OF ALABAMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALABAMA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM N. McQUEEN,
Attorney General of Alabama;
JOHN O. HARRIS,
Assistant Attorney General of Alabama,
Counsel for Respondent.

INDEX

Subject Index

	Page
Opinion of the Court below	1
Jurisdiction	1
Statement of case	2
Factual Misstatements by Petitioner:	
Misstatement No. 1	2
Misstatement No. 2	2
Misstatement No. 3	3
Misstatement No. 4	3
Proposition of law	3
Argument	4

Table of Statutes

U. S. C. A., Title 28, Section 344	2

Table of Cases Cited

French v. *Hopkins* (Cal. 1888), 124 U. S. 524, 8 Sup. Ct. 589, 31 L. Ed. 536	3
Gasquet v. *Lapeyre, et al.*, 242 U. S. 367	4
Gibson v. *Mississippi* (Miss. 1896), 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075	4
Grand Rapids, etc., R. Co. v. *Butler* (Mich. 1895), 159 U. S. 87, 15 Sup. Ct. 991, 40 L. Ed. 85	4
Iowa Cent. R. Co. v. *Iowa* (Iowa 1896), 160 U. S. 389, 16 Sup. Ct. 344, 40 L. Ed. 467	4
Loeber v. *Schroeder* (Md. 1893), 149 U. S. 580, 13 S. Ct. 934, 37 L. Ed. 856	4
Milkwagon Drivers Union of Chicago, Local 753 v. *Meadowmoor Dairies, Ill.*, 312 U. S. 287, 61 Sup. Ct. 552, 85 L. Ed. 836	4
McNulty v. *California* (Cal. 1893), 149 U. S. 645, 13 Sup. Ct. 959, 37 L. Ed. 882	4
Northern Pac. R. Co. v. *Patterson* (Mont. 1894), 154 U. S. 130, 14 Sup. Ct. 977, 39 L. Ed. 934	4

Page

O'Neil v. *Vermont* (Vt. 1892), 144 U. S. 323, 12 Sup. Ct. 693, 36 L. Ed. 450 3

Thorington v. *Montgomery* (Ala. 1893), 147 U. S. 490, 13 Sup. Ct. 394, 37 L. Ed. 252 3

Tripp v. *Santa Rosa St. R. Co.* (Cal. 1892), 144 U. S. 126, 12 Sup. Ct. 655, 36 L. Ed. 372 3

Vincent v. *California* (Cal. 1893), 149 U. S. 648, 13 Sup. Ct. 960, 37 L. Ed. 884 4

Wood v. *Brady* (Cal. 1893), 150 U. S. 18, 14 Sup. Ct. 6, 37 L. Ed. 981 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 525

AMOS COTNEY,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the Court of Appeals of Alabama and the opinion of the Supreme Court of Alabama, which are here under consideration, have not been officially reported, but they are published in 26 So. (2d) 598, 603, and 608.

II

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court to review the judgment of the Court of Appeals of Alabama, rendered in this cause, and relies upon Section 237 (b) of

the United States Judicial Code as amended on February 13, 1945, 43 Stat. 937 (U. S. C. A., Title 28, Section 344) as giving this Court jurisdiction.

III

Statement of Case

We do not deem it necessary to set forth a full statement of this case. However, we assert that the statement of the case and facts as made by the petitioner is erroneous and misleading in many material respects. We will point out wherein petitioner has misstated the facts.

Factual Misstatements by Petitioner

MISSTATEMENT No. 1

Petitioner charges that there was substantial evidence that another person was shooting at the petitioner immediately before and at the time the fatal shot which killed Adams was fired. The record discloses, except for the testimony of the petitioner himself and that of his wife, that petitioner fired the first shot and that no one else fired at the petitioner until the deceased was shot by the petitioner (R. pp. 5-25).

MISSTATEMENT No. 2

Petitioner charges that the testimony of the widow tended to prove that petitioner maliciously and intentionally shot and killed Adams and that her testimony was in direct contradiction of the great weight of the testimony to the effect that petitioner was being attacked by another person who was firing at him with a pistol or shotgun, and whose attack was being resisted when the deceased, Adams, inadvertently received his fatal wound. The record discloses that petitioner had shot the deceased twice, and had

fired three more shots, before another shot was fired by any one (R. pp. 5-25, 36-49, 62-83, 83-91, 96-104, 129-131).

MISSTATEMENT No. 3

Petitioner charges that he attempted to prove by Dr. Cole (R. pp. 55-59) that he had a conversation with the deceased and that the deceased made a contradictory statement to him while in the hospital. The record discloses that there was never an effort to prove a contradictory statement by the deceased, but that the only statement that petitioner sought to prove was the statement made by the deceased on the way to the hospital and at the hospital, and that these statements were offered as dying declarations only.

MISSTATEMENT No. 4

Petitioner charges that he sought to prove contradictory statements made by decedent Adams to Dr. Moore (R. pp. 59-61). The record discloses that the statement attributed to the decedent by the two doctors, which petitioner sought to prove, was offered only as a dying declaration, and not as a contradiction of decedent's statements.

Proposition of Law

A decision of a state court resting on grounds of state procedure does not present a Federal question.

French v. *Hopkins* (Cal. 1888), 124 U. S. 524, 8 S. Ct. 589, 31 L. Ed. 536;

O'Neil v. *Vermont* (Vt. 1892), 144 U. S. 323, 12 S. Ct. 693, 36 L. Ed. 450;

Tripp v. *Santa Rosa St. R. Co.* (Cal. 1892), 144 U. S. 126, 12 S. Ct. 655, 36 L. Ed. 372;

Thorington v. *Montgomery* (Ala. 1893), 147 U. S. 490, 13 S. Ct. 394, 37 L. Ed. 252;

Loeber v. *Schroeder* (Md. 1893), 149 U. S. 580, 13 S. Ct. 934, 37 L. Ed. 856;

McNulty v. *California* (Cal. 1893), 149 U. S. 645, 13 S. Ct. 959, 37 L. Ed. 882;

Vincent v. *California* (Cal. 1893), 149 U. S. 648, 13 S. Ct. 960, 37 L. Ed. 884;

Wood v. *Brady* (Cal. 1893), 150 U. S. 18, 14 S. Ct. 6, 37 L. Ed. 981;

Northern Pac. R. Co. v. *Patterson* (Mont. 1894), 154 U. S. 130, 14 S. Ct. 977, 38 L. Ed. 934;

Grand Rapids, etc., R. Co. v. *Butler* (Mich. 1895), 159 U. S. 87, 15 S. Ct. 991, 40 L. Ed. 85;

Iowa Cent. R. Co. v. *Iowa* (Iowa 1896), 160 U. S. 389, 16 S. Ct. 344, 40 L. Ed. 467;

Gibson v. *Mississippi* (Miss. 1896), 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075;

Milkwagon Drivers Union of Chicago, Local 753 v. *Meadowmoor Dairies,* Ill., 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836;

Gasquet v. *Lapeyre, et al.,* 242 U. S. 367.

Argument

THE COURT OF APPEALS AND THE SUPREME COURT OF ALABAMA DID NOT DECIDE A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT. NEITHER DID THEY DECIDE ANY QUESTION PRESENTED TO THEM IN THIS CASE IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT, BUT FULLY AND FAIRLY DECIDED THE ISSUES SOUGHT HERE TO BE REVIEWED ON AN INDEPENDENT GROUND.

There is nothing in the Fourteenth Amendment guaranteeing due process and equal protection which converts an issue respecting the jurisdiction of a state court under the Constitution and statutes of the state into anything other

than a question of state law and procedure, and a decision by the state court of last resort upon the question of procedure is binding upon this Court. *Gasquet* v. *Lapeyre, supra.*

For these reasons, we believe that this Court does not have jurisdiction in this case and, on such reasons, we respectfully move to dismiss the petition here sought.

WILLIAM N. MCQUEEN,
Attorney General;
JOHN O. HARRIS,
Assistant Attorney General,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 525

AMOS COTNEY,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent

MOTION TO DISMISS

Come William N. McQueen, Attorney General of Alabama, and John O. Harris, Assistant Attorney General of Alabama, and move to dismiss the petition for writ of certiorari in this case, and as grounds for such motion assign separately and severally the following:

1. The decisions of the Court of Appeals of Alabama and the Supreme Court of Alabama were rested on a question of state procedure and a Federal question was not necessary or involved to the determination of the cause.

2. The Federal question presented to this Court for decision is not substantial in character.

WILLIAM N. MCQUEEN,
Attorney General;
JOHN O. HARRIS,
Assistant Attorney General,
Counsel for Respondent.